

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RECEIVED

Timothy Williams,
Movant/Defendant,

VS.

UNITED STATES OF AMERICA,
Respondent,

Case No.: CR-05-216MEF

2:07CV742-MEF
DISTRICT COURT
MIDDLE DISTRICT ALA

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR EVIDENTIARY HEARING

NOW COMES, the Defendant, Timothy Williams, in the above - entitled matter and respectfully urges this Honorable Court to conduct an evidentiary hearing on his 28 U.S.C. 2255 motion to vacate, set aside, or correct sentence. In support of this request, the Defendant respectfully refers this court to the arguments and authorities set forth in his memorandum of law in support of his 2255 motion to vacate, set aside, or correct sentence, and further states:

Pursuant to the rules governing Section 2255 proceedings for the United States District Courts, the basic scope of this post - conviction remedy is prescribed by 28 U.S.C. 2255 Rule 8 (A) states "If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any material submitted under Rule 7 to determine whether an evidentiary is warranted.

Movant contends that this Honorable Court have granted supplement motions consistent with **Rule 7(A)** and **(B)** of the rules governing 2255 proceedings, which requires to be reviewed pursuant to **Rule 8(A)**, therefore, See Doc. # 13 Granting Doc. # 10- "Motion to Amend," See Doc. # 33 Granting Doc. # 14- "Request to File After October 12, 2007," See Doc. # 26, stating "Motion for Evidentiary hearing may be reconsidered if warranted by further Developments in this case." See the Further development in Doc. # 27 where this Honorable Court supplemented two cases submitted in support of issues addressed in Movant's Amended 2255. See Doc. # 36 granting to supplement doc. # 34- "Motion to Dismiss Count 2 of the Indictment." See Doc. # 44 granting supplement doc. # 43- "Ineffective Assistance of Counsel- Failure to Appeal Adequate Notice of Offense."

Clearly, this Honorable Court, exercising its sound discretion, may grant an evidentiary hearing in proceedings brought pursuant to 28 U.S.C. 2255. The Eleventh Circuit held in Aron v. United States, 291 F.3d 708 (11th Cir. 2002) that "if the defendant alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claims." Holmes v. United States, 876 F.2d 1545 (11th Cir. 1989); 28 U.S.C. 2255 Rule 8. See also Drew v. Department of Corrections, 297 F.3d at 1302 (11th Cir. 2002) where the Eleventh Circuit Court of Appeals held "we review a district court's denial of an evidentiary hearing for an abuse of discretion. We have held that a district court abuses its discretion by failing to hold an evidentiary hearing when the defendant alleges facts that, if true, would entitle him relief."

Section 2255 provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall... grant a **prompt** hearing thereon, determine the issues and make finding of fact and conclusion of law with respect thereto."

Movant contend that **all circuits** in the federal judicial court system, including the Supreme Court of the United States have upheld this rule in 2255 proceedings, see Fontaine v. United States, 411 U.S. 213 (1973) reversing summary dismissal and remanding for hearing because "Motion and the files and records of the case [did not] conclusively show that the petitioner is entitled to no relief." See Arredondo v. United States, 178 F.3d 778 (6th Cir. 1999) "District court abused its discretion in refusing to hold an evidentiary hearing on ineffective assistance claim, given that petitioner's allegations were not "contradicted by the record, inherently incredible, or conclusions rather than statements of facts." See Shaw v. United States, 24 F.3d 1040 (8th Cir. 1994) "District court erred by denying evidentiary hearing on allegations of ineffective assistance that there were neither inadequate on their face nor conclusively refuted by the record." See United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994) "District court abused discretion by denying evidentiary hearing on claim of ineffective assistance of counsel which, assuming accuracy of factual allegations, provided basis for relief" See United States v. Essig, 10 F.3d 968 (3rd Cir. 1993) "Generally, if prisoner's 2255 petition raises an issue of material fact, the district court must hold an evidentiary hearing to determine the truth of the allegations."

See United States v. Bartholomew, 974 F.2d 39 (5th Cir. 1992)

"A motion brought under 28 U.S.C. 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." See Anderson v. United States, 948 F.2d 704 (11th Cir. 1991) "Movant entitled to evidentiary hearing because "the record does not conclusively show that [his] contentions are without merit." Lastly see United States v. Aiello, 900 F.2d 528 (2nd Cir. 1990); Dziurgot v. Luther, 897 F.2d 1222 (1st Cir. 1990); and United States v. Marr, 856 F.2d 1471 (10th Cir. 1988); United States v. Barnes, 662 F.2d 777 (D.C. Cir. 1980); Stokes v. United States, 652 F.2d 1, 2 (7th Cir. 1981) Cert den., 464 U.S. 836 (1983) "reversible error for district court not to hold hearing to resolve genuine factual dispute."

Movant contends that in this instant case, an evidentiary hearing is necessary to investigate whether a factual basis existed for his guilty plea to be accepted by the district court on counts one and count two, charging **Title 21 U.S.C. 841(A)** and **Title 18 U.S.C. 924 (C)** and necessary to investigate whether defense counsel Christine Freeman labored under a conflict of interest when she assumed the role of an United States prosecutor in [attempting] to establish a factual basis for her clients guilty plea for the federal government and the district court.

An evidentiary hearing is necessary to investigate the deficient performance by defense attorney Tiffany McCord by failing to file an appeal, failing to file an Anders Brief with

with the court, and failing to consult with her client about the advantage and disadvantage of an appeal, before she "Based only on her own alleged review, and in a sworn affidavit, that there were no meritorious issues to appeal." An evidentiary hearing is necessary to investigate the deficient performance by defense attorneys Jennifer Hart and Kevin Butler for failing to apply basic American Bar Association Standards and the Sixth Amendment guarantee that all available defense be raised so that the government is put to ~~it~~ proof of their constitutional jurisdiction and subject-matter jurisdiction to hear this case and bar.

Claims of ineffective assistance of counsel raise a cognizable Constitutional issue that can serve as the basis of an motion under Section 2255, when facts important to Constitutional rights and sentencing determination are genuinely in dispute, an evidentiary hearing may be necessary to resolve any factual discrepancies. U.S.S.G. 6A1.3(A); United States v. Garcia, 954 F.2d 12 (1st Cir. 1992).

Movant further contends that an order granting an evidentiary hearing in Section 2255 cases carries with it the same automatic right to appointment of counsel for indigent claimants as in habeas corpus proceedings. See **Rule 8(c)** of the rules governing Section 2255 proceedings for the United States District Courts (2007). "If a evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. 3006A." See United States v. Vasquez, 7 F.3d 81-83-86 (5th Cir. 1993) "Grant-

ing of evidentiary hearing on Section 2255 motion required appointed of counsel; **"the provisions of the rule are mandatory and clear."**

Additionally, the defendant respectfully request his presence at the evidentiary hearing. Generally, if issues of facts is presented, the practice has been to issue the writ, have the prisoner produced, and hold a hearing at which evidence is received.

Given the significance of such proceedings to the Defendant and the defendant's possible familiarity with an ability to advise counsel concerning factual issues, the prisoner's presence at the defense counsel's table through-out the proceedings with any physical restraints the court deem necessary be reasonable and not impede counsel's ability to consult freely and regularly with their client.

Movant contend's that because Section 2255 proceeding continue the original criminal proceeding, (See advisory committee note Rule 1 of the rule governing Section 2255 proceedings for the United States district courts). While habeas corpus is an independant civil action, one might expect a greater right to presence in section 2255 since the Sixth Amendment of the United States Constitution clearly establishing rights to presence at trial for criminal defendant but not civil litigants.

Based on the foregoing argument and authorities, this Honorable Court is respectfully urged to grant Defendant Timothy Williams an evidentiary hearing pursuant to **Rule 8(A) and 8(c)**

of the Rules Governing Section 2255 proceeding for the United States district courts.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Timothy Williams", is written over a horizontal line.

Timothy Williams Defendant
Reg. No. 11778-002
F.C.I. Oakdale
P.O. Box 5000
Oakdale, LA. 71463-5000

Done this 23 Day of July, 2008.


-CERTIFICATE OF SERVICE-

I, Timothy Williams, ^{MOVANT} ~~Appellant~~, hereby certify that a true copy of ^{this motion} ~~this motion~~ have been provided to the following parties via first class mail postage pre-paid on this 23 Day of July, 2008, to the following:

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U.S. District Judge
Mark Fuller
1 Church Street, Suite B-100
Montgomery, Alabama 36104

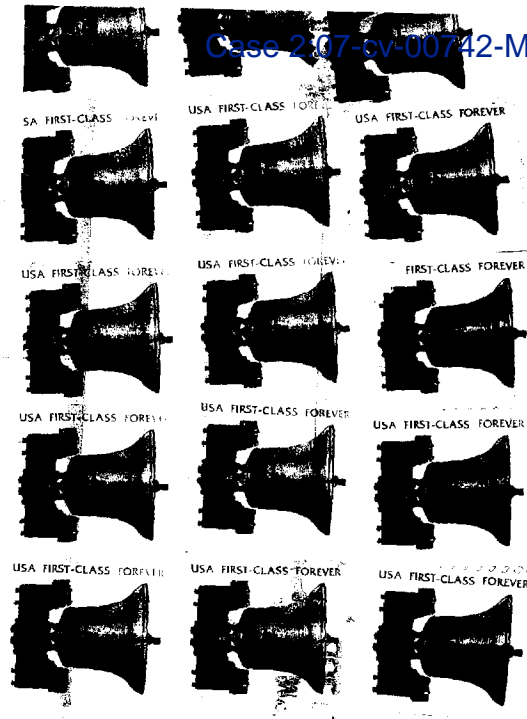
United States Attorney Officer
ATT: Attorney Susan Redmond
One Court Square, Suite 201
Montgomery, Alabama 36104

Respectfully Submitted,


Mr. Timothy Williams pro se
F.C.I. Oakdale # 11778-002
P.O. Box 5000 Vernon - 01
Oakdale, LA. 71463-5000

in accordance with 28 U.S.C. § 1746.

Timothy Williams - 11778-002
 Federal Correctional Institution
 P.O. Box 5000
 OAKdale, LA 71463



Clerk of the Court
 1 Church Street, Suite B-100
 Montgomery, Alabama 36104



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